No. 89-182

In The

Supreme Court of the United States

October Term, 1989

JACK J. GRYNBERG and CELESTE C. GRYNBERG,

Petitioners,

v.

PAUL DANZIG, et al.,

Respondents.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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I. Summary of Reply.

Respondents' "Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit" (the "Opposition")[1] (a) relies on matters not contained in the Record and on demonstrably false assertions of fact; and (b) cites no authority which contradicts the Grynbergs' contention that the Circuit Court could not properly accord full faith and credit to the California Judgment without *first* determining that it had been entered in conformity with due process holdings of this Court.

II. The Opposition Relies Upon Matters Not Contained in the Record, Contrary to the Record or Demonstrably False on the Record.

The Opposition, in disregard of Rules 22.1 and 34.5 of the Rules of this Court, virtually ignores the Record. More significantly, material matters on which Respondents state reliance are not in the Record. This Court should not be required to sift through the Opposition to separate record from non-record and truth from contrivance; Respondents' entire factual recitation should be ignored. Certain assertions, however, must be addressed:

A. Respondents state, without reference to the Record, that the trial court found "that all of the requisites of . . . a class judgment had been satisfied" (Opp., p. 7) and

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[1] Respondents' Opposition is cited herein as "Opp." Terms defined in the Petition have the same meaning in this Reply.

that the trial "court *did* find . . . that entry of judgment in favor of the entire class was proper" (*Id.*, at n. 6 (emphasis in original)). These statements are contradicted by the Record, which discloses that the trial court neither made the specific finding urged by Respondents nor made any finding that it had, or how it had acquired, jurisdiction over the Absent Plaintiffs. *See* Petition, pp. 4, 18. The Findings of Fact and Conclusions of Law of the trial court, upon which Petitioners rely (ROA pp. 397-419), is appended hereto as an addition to the Appendix beginning at p. A51.

B. Respondents attempt to dispute the statement of the Petition (p. 6) that the lower courts concluded that *Phillips* lacked "societal importance" (Opp., p. 10, n. 12). The plain meaning of the language quoted by the Petition belies this attempt. *See* App. pp. A34, and *see* A12.

C. Respondents claim that the Petition asserts the same issues as were urged to and decided by the California appellate courts is without factual basis. Opp., pp. 8-9. Because the Grynbergs' principal assertions involve the refusal of the Circuit Court to review the California Judgment in the light of the post-judgment holding of *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985) (*Phillips*), the assertions could not have been made in California and could not have been previously brought to the attention of this Court.

III. Respondents' Contention that Res Judicata Bars Federal Court Review of All State Court Judgments is Patently Erroneous.

The essence of the Opposition, and of its infirmity, is Respondents' remarkable assertion that no state court judgment, even one entered in violation of due process requirements, may be challenged or examined in a subsequent federal proceeding (Opp., p. 13). This claim, and the Opposition, is eviscerated by clear, continuous precedent of this Court, cited in the Petition, that a judgment entered in violation of minimum due process requirements is not entitled to full faith and credit and, as such, is not res judicata. *See* Petition, Sections III A and B.

None of Respondents' authorities disputes the Grynbergs' proposition that no federal court may give full faith and credit to a state judgment without first inquiring into whether controlling legal principles have changed since entry of judgment and proceedings leading to the entry of that judgment satisfied minimum due process. *Montana v. United States*, 440 U.S. 147, 155 (1979), *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 480-481 (1982).

IV. The Opposition and the Lower Courts' Assertions that the Change in Law Enunciated by *Phillips* Need Not be Applied to the California Judgment is Based on a Standard Never Enunciated by any Other Court.

Having asserted the immutability of res judicata as applied to state court judgments, Respondents acknowledged that the District Court, contrary to Respondents'

contentions, recognized that an intervening change in law constitutes an exception to application of that doctrine. Opp., Section III B. The District Court, however, held that a change in constitutional principles, such as enunciated in *Phillips*, "does not preclude application of *res judicata*, unless continued enforcement of the previously entered judgment would result in the continuation of unconstitutional conduct or preclusion of rights." Opp., p. 16 quoting App. p. A11. In requiring federal courts to inquire whether "controlling facts or legal principles have changed significantly since the state-court judgment" before according full faith and credit to that judgment, this Court did not make any such distinction. *Montana v. United States, supra*, 440 U.S. at 155 (1979). *See also, State Farm Mut. Automobile Ins. Co. v. Duel*, 324 U.S. 154, 163 (1945).

The District Court cited no decision of any Court limiting the impact of constitutional pronouncements to cases in equity. No precedent can be, or was, cited for the proposition that the Bankruptcy, District Court, and Circuit Courts were not bound by *Phillips*. *Phillips* was decided before the judgment at issue was final; before the Bankruptcy Court allowed the claims based upon the California Judgment; and before the District and Circuit Courts affirmed that order. The application of *Phillips* is not optional, it is mandatory. Constitutional rules announced by decisions of this Court, under the Supremacy Clause, are binding upon both state and federal courts. *Henry v. Rock Hill*, 376 U.S. 776, 777 n.1 (1964). "As a rule, judicial decisions apply 'retroactively.' Indeed, a legal system based on precedent has a built-in presumption of retroactivity." *Solem v. Stumes*, 465 U.S. 638, 642 (1984) (citation omitted).

V. Respondents' Claim that Due Process was Satisfied by the Notice and by the Absent Plaintiffs' Responses to Interrogatories Is Refuted by the Record and the Law of the *Danzig* Action.

Respondents assert that "*Phillips* would have required no different result in the *Danzig* action" (Opp., p. 19) because minimum due process "was surely afforded to the *Danzig* claimants by the class notice that was sent to them as well as by the interrogatories which were sent to each of them and to which each of them responded" (*Id.*, p. 18). In fact, Respondents concede that no notice of the 1979 amendments was given. *Id.*, p. 22; the Bankruptcy Judge expressly so found ("No notice of the amendments was given to the Class" (App. p. A27); accord, *Danzig v. Jack Grynberg & Associates*, 161 Cal.App.3d 1128, 1137 n.5, 208 Cal.Rptr. 336, 341 n. 5 (1984)).[2] In the absent of notice, opt out rights were not granted.

Respondents exhibit temerity in relying on responses to interrogatories posed long before the assertion of the Money Damages Claim as a basis for the trial court's jurisdiction over the Absent Plaintiffs. First, Respondents did not designate the interrogatories or the answers as part of the Record and so failed to preserve the contention for review. *Chambers County v. Clews*, 88 U.S. 317, 324 (1874). Secondly, in asserting that responses by Absent

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[2] The 1976 class notice (App. pp. A42-A47) not only fails to provide the "best practicable" notice of the 1979 Money Damages Claim; it describes requests for relief contrary to and exclusive of that Claim. *See Phillips*, 472 U.S. at 812.

Plaintiffs to interrogatories constituted a *"general appearance"* in the case (Opp., p. 19 [emphasis by Respondents]), Respondents fail to apprise this Court of a contrary California appellate decision in which Respondents and their counsel participated. In rejecting an interlocutory appeal by Respondents and compelling interrogatory responses by Absent Plaintiffs, the California Court of Appeal expressly recognized that the Absent Plaintiffs may be simply "persons," not "parties", and rejected the proposition "that unnamed class members stand on the same footing as named parties to whom interrogatories have been propounded." *Danzig v. Superior Court for Alameda County*, 87 Cal.App.3d 604, 612, 151 Cal.Rptr. 185, 190 (1978)[3].

VI. Respondents' Assertion of Waiver Conflicts With and is Not Supported by the Appellate Ruling Affirming the California Judgment.

Respondents' assertion that the Grynbergs waived due process objections to the California Judgment (Opp., Section V) is fatally undermined by Respondents' failure to distinguish between class certification proceedings and post-certification notice proceedings. The former

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[3] Respondents' claim that the Absent Plaintiffs were parties in the California action diametrically contradicts the trial court's findings (App. p. 72 (¶1)) and their strident protestations throughout this case that the *Danzig* action was a proper class action.

have no constitutional import and are not at issue here[4]; under *Phillips*, the latter are necessary to jurisdiction over the Absent Plaintiffs and to the full faith and credit status of the California Judgment and are central to the Petition. *See* Petition, p. 21. None of Respondents' California Rule 23(b)(3) – type authorities holds that a waiver of objections to class certification absolves the need for notice or opt out rights at some time in the case. (Opp., pp. 22-23.) Only when the California Judgment was entered without

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[4] Respondents assert, that by gambling on the result of trial and raising objections only after adverse judgment, the Grynbergs waived their right to object to entry of judgment in favor of the Absent Plaintiffs. Opp., p. 15. Respondents should have advised this Court that, prior to the entry of the California Judgment, the California authority it cites for that proposition does not require a class action judgment in favor of absent plaintiffs in such circumstances:

> Even though a determination of the partial summary judgment issue in its favor *may not have been legally binding on unnotified class members*, defendant assumed that risk by not raising a timely objection to the trial court's resolution of the motion before class notification. As the *Home II* court, [*Home Sav. & Loan Assn. v. Superior Court*, 54 Cal.App.3d 208, 126 Cal. Rptr. 511] noted: "If a defendant chooses to run the risk of *collateral estoppel* on an unfavorable judgment, it is defendant's right to due process that it hazards."

Civ. Serv. Emp. Ins. v. Super. Ct. of City & Cty. of S.F., 22 Cal.3d 362, 375, 149 Cal.Rptr. 360, 367, 584 P.2d 497, 504 (1978) (Emphasis supplied). The risk of *issue preclusion* (collateral estoppel) and judgment in favor of only the named plaintiffs could be a worthwhile gamble; however, a judgment in favor of unnotified persons, or res judicata *claims preclusion*, is a significantly larger risk, one which the Grynbergs were the first to suffer.

notice having been given to the Absent Plaintiffs were the Grynbergs' due process rights violated; only then could the Grynbergs first have objected to that violation. Respondents agree that the Grynbergs timely asserted that objection. Opp., pp. 7, 22.[5]

VII. The Opposition Confirms the importance of The Questions Presented by the Petition.

Rather than rebutting the Grynbergs' reasons for granting their Petition, the Opposition confirms and crystallizes two issues underlying the questions presented to and not previously decided by this Court, making appropriate the granting of the Petition:

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[5] Respondents claim that the Grynbergs' argument that the California Court of Appeal did not hold that they had waived their objections to any deficiency in the class notice is a "patent misrepresentation." Opp., p. 23. The statement alleged to be a misrepresentation is an accurate quotation. *Danzig*, 161 Cal. App. 3rd at 1137, 208 Cal. Rptr. at 341. Respondents also state that the Grynbergs' reliance upon the language of the California appellate court is "impermissibly made for the first time in this Court". Opp., p. 23. The argument complained of is not improperly made – it challenges the Circuit Court holding that the California waiver holding precluded review of the underlying jurisdictional predicate. (App. pp. A3-A4.) That holding was new in this case. *See* Petition, p. 21. In any case, this Court may explore the whole record to determine constitutional issues before it, whatever the parties may argue from that record. *See General Motors Corporation v. Washington*, 377 U.S. 436, 441-442 (1964).

(A) whether, under *Phillips*, notice and opt-out requirements for class action money damages claims differ for, or are not applicable, to claims added by amendment (Opp., p. 18); and

(B) whether a class action defendant has a responsibility under *Phillips* to alert class representatives of the absence of notice to absent plaintiffs of a money damages claim at the risk of waiving the right to object to a judgment entered without such notice (Opp., p. 22).

VIII. CONCLUSION

For the foregoing reasons, this Petition for the issuance of a writ of certiorari to the United States Court of Appeals for the Tenth Circuit should be granted, and the case reversed and remanded for further consideration in the light of *Phillips*.

Respectfully submitted,

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Superior Court,
State of California
FOR THE COUNTY OF ALAMEDA

PAUL DANZIG, ET AL.,
Plaintiffs,

vs. **No. 426 022-4**

JACK GRYNBERG & ASSOCIATES, ET AL.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Trial of the within action commenced on February 14, 1980, before the Honorable Spurgeon Avakian presiding without a jury, the parties having waived trial by jury and stipulated to trial by the Court. Bancroft, Avery & McAlister by Sandra J. Shapiro and Janet Friedman appeared as attorneys for the plaintiff class and Fishman & Geman by William Fishman, Haas & Pahlmeyer by Jason Pahlmeyer, and Neil Ayervais, appeared as attorneys for defendants. Oral and doumentary evidence were introduced, trial briefs were filed and the matter was submitted:

The Court hereby makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. In 1972 defendants solicited the members of the plaintiff class to become limited partners in a proposed

limited partnership to be formed by defendants for the purpose of exploring for oil and gas. Said partnership was to be known as the Greater Green River Basin Drilling Program 72-73, limited partnership (hereinafter "GGR").

2. A partnership agreement for GGR was recorded in the City and County of Denver, State of Colorado on May 12, 1972. Under the terms of the proposed partnership, the general partner was to hold a 50% interest in the said partnership and the income and profits thereof; the limited partners were to hold a 50% interest pro rata in said partnership and the income and profits thereof, in accordance with their respective purchases of limited partnership interests in the partnership. The maximum capitalization of the partnership was specified to be $4,000,000; all of said capitalization was to be contributed by the purchasers of limited partnership interests. Limited partnership interests were sold in units. The price per unit was $200,000. Members of the class purchased either whole units or fractional parts of units.

3. At all times relevant hereto, the general partner of GGR was defendant Jack Grynberg & Associates, a sole proprietorship, owned by defendant Jack Grynberg.

4. At all times relevant hereto, defendants Jack Grynberg and Celeste Grynberg were, and are, husband and wife.

5. At all times relevant hereto, defendants, and each of them, were residents of the State of Colorado.

6. The plaintiff class consists of all of the purchasers of limited partnership interests in GGR. The members of

the plaintiff class, together with the state of residence of each member of the class are identified on Exhibit A hereto, which said exhibit is hereby incorporated herein by this reference.

7. Each member of the plaintiff class purchased a limited partnership interest in GGR. The total subscriptions to GGR by the members of the plaintiff class was $4,000,000. The percentage interest in the limited partnership purchased by each member of the plaintiff class is set forth on Exhibit B, column 1, which said Exhibit is hereby incorporated herein by this reference.

8. Defendants solicited purchases of limited partnership interests from residents of many states including, but not limited to, the State of California. In pursuing said solicitation efforts, defendants traveled to various states, including the State of California, mailed prospectuses and partnership agreements to persons residing in many states, including the State of California, and engaged in telephone conversations with persons in various states, including the State of California.

9. During the course of their sales solicitations, defendants prepared seven successive versions of the prospectus and partnership agreement with regard to GGR. Defendants delivered to each member of the plaintiff class a copy of each successive version of said prospectus and partnership agreement prior to execution of the subscription agreements by which the members of the plaintiff class purchased their respective interest in GGR.

10. The prospectus for GGR constituted part of the partnership agreement.

11. Each successive version of the prospectus and partnership agreement which was sent to each member of the plaintiff class was identical in physical form and format. Various changes were made in each version of the prospectus; most of the changes were not substantive. However, Amendment No. 2 contained a material change in language with regard to the contribution to be made by the general partner in consideration for its interest in GGR. Defendants did not in any way disclose to any member of the plaintiff class that any material change had been made in the language of the later versions of the prospectus describing the contribution which would be made by defendants in return for the general partner's interest in the partnership.

12. Prior to execution of the subscription agreements to GGR by the members of the plaintiff class, defendants caused written summaries of the GGR prospectus and agreement to be sent to each member of the plaintiff class; the summaries purported to summarize and explain the material terms of the partnership.

13. The final versions of the prospectus and agreement are unclear and confusing with regard to the contribution to be made by the defendants in return for the general partner's interest in GGR. The members of the plaintiff class were entitled to rely upon the summaries and the other representations made by the defendants with regard to the contribution to be made by the defendants to the partnership in return for the general partner's interest in the partnership.

14. The members of the plaintiff class justifiably believed that the summaries provided that the oil and gas

leases which were owned by and which were acquired in the Greater Green River Basin by defendants Jack and Celeste Grynberg would be contributed by them to GGR as assets thereof, and that said leases would be distributed pro rata to all of the partners of GGR upon termination of the partnership. The members of the plaintiff class justifiably believed that the summaries correctly and adequately reflected the provisions of the prospectus and partnership agreement. The members of the plaintiff class justifiably relied upon the provisions of the summaries in subscribing to limited partnership interests in GGR and in making their respective contributions to capital of GGR.

15. At the time of the distribution of the summaries to the members of the plaintiff class, defendants knew that the members of the plaintiff class would be likely to be misled by the language of the summaries concerning the true intention of the defendants with regard to the contribution of the subject leases as assets of GGR.

16. The members of the plaintiff class were induced by the acts and misrepresentations of the defendants not to read with care the final versions of the prospectus issued by defendants; and the members of the plaintiff class justifiably relied on the acts and conduct of defendants in failing to ascertain or understand the changes in language which defendants caused to be included in the final versions of the prospectus.

17. At all times prior to execution of their subscription agreements, and at all times prior to making their respective payments for GGR, each member of the plaintiff class justifiably believed that defendants Jack and

Celeste Grynberg would contribute the leases held by them in the Greater Green River Basin, together with all leases subsequently acquired by them in that Basin, to GGR as assets of the partnership, as the contribution of the general partner Jack Grynberg & Associates to said partnership, and that said leases would not revert to said defendants upon termination of the partnership but would be distributed to all partners pro rata.

18. At the time of the solicitations by defendants of the members of the plaintiff class to purchase interests in GGR, and at the time of execution of their respective subscription agreements by the members of the plaintiff class, defendants Jack and Celeste Grynberg owned in excess of 200,000 acres of oil and gas leases in the Greater Green River Basin, located in the States of Colorado, Wyoming and Utah; some of the leases stood of record in the name of Jack Grynberg and some of the leases stood of record in the name of Celeste Grynberg. Said defendants acquired additional leases in said Basin during the term of GGR.

19. Prior to execution of subscription agreements for the purchase of limited partnership interests in GGR by the members of the plaintiff class, the defendants represented to each member of the plaintiff class that in consideration for the money to be contributed by the limited partners, and in consideration for the interest in GGR to be received by the general partner, defendants Jack Grynberg and Celeste Grynberg would contribute all of the oil and gas leases then owned by said defendants in the Greater Green River Basin, and all leases acquired by said defendants, or either of them, in the Greater

Green River Basin during the term of the partnership, to GGR as assets of said partnership.

20. Prior to execution of subscription agreements for the purchase of limited partnership interests in GGR by the members of the plaintiff class, the defendants further represented to each member of the plaintiff class that the said leases owned or to be acquired by the defendants Jack and Celeste Grynberg in the Greater Green River Basin would not revert to said defendants at the termination of the partnership, but would be distributed to all partners pro rata upon dissolution and termination of the partnership. They further represented as an advantage of GGR in contrast with other oil and gas ventures that his avoided any conflict of interest which might otherwise have arisen if leases not chosen by defendants for drilling were to revert to them.

21. At no time did defendants disclose to the members of the plaintiff class that the subject leases would not become assets of the partnership subject to distribution pro rata upon termination thereof, and that defendants did not intend to contribute said leases to GGR as assets thereof; defendants further failed to disclose to the members of the plaintiff class that the subject leases which were not drilled by the partnership would revert to defendants Jack and Celeste Grynberg upon termination of the partnership and that the limited partners would not acquire a pro rata interest in said leases upon termination and dissolution of GGR.

22. At all relevant times defendant Jack Grynberg acted on behalf of defendants Jack Grynberg & Associates and Celeste Grynberg in promoting the subject limited

partnership and soliciting the members of the plaintiff class to purchase limited partnership interests in the subject partnership.

23. At all relevant times defendant Jack Grynberg was acting as the agent of defendants Jack Grynberg & Associates and Celeste Grynberg with regard to the solicitation of purchases of limited partnership interests in GGR by members of the plaintiff class.

24. At the time that the aforesaid representations were made they were untrue, and defendants knew that said representations were untrue; defendant Jack Grynberg knew that the leases of Jack and Celeste Grynberg would not be contributed to the partnership as assets thereof and further knew that the defendants did not intend the subject leases to become assets of GGR; defendants further knew that the defendants did not intend that the subject leases would be distributed pro rata to all the partners upon termination of the partnership, but instead intended that the subject leases, except for those actually drilled by the partnership, would revert solely to defendants Jack and Celeste Grynberg upon termination of the partnership, and that the limited partners would have no interest in said leases.

25. At all relevant times, defendants knew that said misrepresentations and nondisclosures were material to the members of the plaintiff class and that the members of the plaintiff class would rely thereon; and defendants intended that each of said misrepresentations and nondisclosures induce the members of the plaintiff class to purchase limited partnership interests in GGR.

26. Common and similar misrepresentations were made to each member of the plaintiff class.

27. Common and similar nondisclosures were made to each member of the plaintiff class.

28. The aforesaid misrepresentations and nondisclosures were made by defendants to all members of the plaintiff class as part of a common plan and scheme.

29. The aforesaid misrepresentations were material to each member of the plaintiff class in executing subscription agreements to GGR and in making payments for GGR; said misrepresentations would have been material to a reasonable person in the same or similar circumstances as the members of the plaintiff class.

30. The aforesaid nondisclosures were material to each member of the plaintiff class in executing subscription agreements to GGR and in making payments for GGR; said nondisclosures would have been material to a reasonable person in the same or similar circumstances as the members of the plaintiff class.

31. At all relevant times each member of the plaintiff class believed the aforesaid representations to be true.

32. Each member of the plaintiff class was in fact induced to enter into his or her subscription agreement for the purchase of a limited partnership interest in GGR, and, further, to make his or her respective payments for GGR, by each of the aforesaid misrepresentations and nondisclosures.

33. The members of the plaintiff class did not learn the true facts concerning the status of the leases and the

true intentions of the defendants with regard thereto until after they had made all of their payments for GGR.

34. Each member of the plaintiff class justifiably relied upon each of the aforesaid misrepresentations and nondisclosures in purchasing limited partnership interests in GGR and in making their respective payments for GGR; a reasonable person in the circumstances of the members of the plaintiff class at the time of the aforesaid misrepresentations and nondisclosures were made would have relied upon said misrepresentations and nondisclosures in purchasing limited partnership interests in said partnership and making capital payments for GGR.

35. But for the aforesaid misrepresentations and nondisclosures of defendants, the members of the plaintiff class would not have purchased their respective interests in GGR.

36. But for the aforesaid misrepresentations and nondisclosures of defendants, the members of the plaintiff class would not have become limited partners in GGR.

37. But for the aforesaid misrepresentations and nondisclosures of defendants, the members of the plaintiff class would not have paid any of the sums which they in fact paid for GGR.

38. Defendants Jack and Celeste Grynberg both executed a document purporting to assign all of the subject leases to GGR; a copy of said document was sent to each member of the plaintiff class.

39. The subject leases were not in fact assigned or contributed to GGR by defendants Jack and Celeste Grynberg as assets of said partnership.

40. At all relevant times, the subject leases remained of record in the names of Jack and Celeste Grynberg except for such leases as expired or were sold, and with the exception of an assignment of certain leases which contained an express right of reversion of said leases to Jack and Celeste Grynberg upon termination of the partnership.

41. Defendants Jack and Celeste Grynberg did not contribute the leases acquired by them in the Greater Green River Basin during the term of the partnership to GGR as assets thereof; said defendants acquired and retained said leases in their own names.

42. Each of the members of the plaintiff class executed subscription agreements by which they purchased limited partnership interests in GGR.

43. At the time that the members of the plaintiff class executed said subscription agreements, they reasonably believed that the statements contained therein were true.

44. The total sum actually paid by each member of the plaintiff class upon the purchase price of his or her interest in GGR is set forth on Exhibit B hereto, column 2; the dates and amounts of each such payment made by each member of the plaintiff class is set forth in columns 3 and 4 of Exhibit B; said exhibit is hereby incorporated herein by this reference.

45. In 1974, defendants solicited additional capital contributions from the members of the plaintiff class in accordance with a purported amendment to the partnership agreement.

46. Certain members of the plaintiff class made additional capital contributions by virtue of such solicitation. The name of each member of the plaintiff class who made such payments is set forth on Exhibit C. The date of each such payment and the amount of each such payment are set forth on Exhibit C, columns 1 and 2; said exhibit is hereby incorporated herein by this reference.

47. As a direct and proximate result of the aforesaid misrepresentations and nondisclosures, each member of the plaintiff class suffered damage in the amounts paid by each of them as contributions of capital to GGR, in the sums set forth on Exhibit D, column 1, which said exhibit is hereby incorporated herein by this reference.

48. Each member of the plaintiff class suffered, as consequential damages proximately caused by the misrepresentations and nondisclosures of defendants as aforesaid, the loss of the use of the money paid to defendants as contributions to capital of GGR as set forth in Finding No. 47, in an amount equal to 7% per annum from the date of each payment so made. The amounts of such damages suffered by each member of the plaintiff class are set forth on Exhibit B, column 5 and Exhibit C, column 3, which said exhibits are hereby incorporated herein by this reference; the total amount of such damages suffered by each member of the plaintiff class to the date of judgment herein is set forth on Exhibit E, column 2, which said exhibit is hereby incorporated herein by this reference.

49. Alternatively, each member of the class is entitled to interest upon the sums paid by each such member of the class as contributions to capital of GGR at the rate

of 7% per annum from the date of each payment so made; the sums to which each member of the plaintiff class is so entitled are set forth on Exhibit B, column 5 and Exhibit C, column 3; the total amount of such interest is set forth on Exhibit E, column 2, which said exhibits are hereby incorporated herein by this reference.

50. The representations and fraudulent non-disclosures committed by defendant Jack Grynberg were intentionally made by said defendant.

51. In committing the acts, misrepresentations and nondisclosures set forth above, defendant Jack Grynberg acted wilfully, intentionally, maliciously and with a wanton and reckless disregard for the rights of the members of the plaintiff class.

52. By virtue of the wilful, intentional, fraudulent and malicious acts of defendant Jack Grynberg, as aforesaid, each member of the plaintiff class is entitled to punitive damages from said defendant in a sum equal to 10% of the principal amount paid by each said plaintiff as contributions to capital of GGR; the amount of punitive damages to which each said member of the plaintiff class is so entitled is set forth on Exhibit E, column 3, which said exhibit is hereby incorporated herein by this reference.

53. The only sums received by the members of the plaintiff class from defendants with regard to GGR were certain distributions of a portion of the income received by GGR from certain producing wells; the sums so received by each member of the plaintiff class are set forth on Exhibit D, column 2, which said exhibit is hereby incorporated herein by this reference.

54. The members of the plaintiff class received no sums or benefits by virtue of their purchase of their respective interests in GGR other than the sums set forth in Finding No. 53.

55. Defendants can and will adequately be restored to the *status quo ante* by transfer to them of all of the assets of GGR, and an offset against the sums to be repaid by defendants to plaintiffs of the sums set forth in Finding No. 53.

56. Defendants received benefits from the use of the funds paid by the members of the plaintiff class as contributions to capital of GGR.

57. The leases of defendants Jack and Celeste Grynberg in the Greater Green River Basin were benefitted by the sums contributed by the members of the plaintiff class for GGR.

58. Upon termination of the term of GGR, defendants asserted complete dominion and control over all of the leases which defendants had represented would become assets of GGR with the exception of certain leases located in producing prospects. Defendants further asserted that all said leases had reverted to defendants Jack and Celeste Grynberg. At all times after the date provided in the partnership agreement for dissolution of GGR, defendants Jack and Celeste Grynberg have treated the said leases as their sole property and have dealt with said leases as their property.

59. The members of the plaintiff class did not unreasonably delay assertion of their claims for fraud after learning the true facts.

60. Defendants would not have acted in any different manner nor would defendants have done anything differently nor would there have been any change in circumstances if the plaintiff class had asserted its claim for rescission of the partnership agreement at an earlier time.

61. Defendants did not suffer any prejudice by virtue of the fact that the plaintiff class first asserted its claim for rescission of the partnership agreement in their Amendment to the Complaint herein.

62. The members of the plaintiff class did not engage in acts which were inconsistent with their right to rescind the partnership agreement after they acquired knowledge of the aforesaid misrepresentations and nondisclosures.

63. On February 8, 1977, Viersen & Cochran Drilling Company, the firm which did the drilling on the first Kent well, filed an action against Jack J. Grynberg, doing business as Jack Grynberg & Associates in the United States Federal Court for the District of Colorado, being action number 77-M-161 in the records of said Court. On July 5, 1977, defendant Jack Grynberg filed a third party complaint in that action against certain members of the plaintiff class. That third party complaint was dismissed by the district court on procedural grounds; there was no trial on the merits of any issue raised by the third party complaint. The Order of dismissal was appealed to the Tenth Circuit and was reversed by that Court by opinion dated September 10, 1979.

64. The decision rendered by the Tenth Circuit on the appeal by Jack Grynberg & Associates from the

aforesaid Order of Dismissal of said third party complaint in said action was not a decision rendered on the merits.

65. The Tenth Circuit did not decide, nor was any issue presented to that court with regard to, whether the partnership agreement of GGR was valid or enforceable against the limited partners or was subject to rescission by virtue of the misrepresentations and nondisclosures made to the limited partners which had induced them to purchase interests in said partnership.

66. Defendants voluntarily engaged in substantial activities within the State of California in the course of soliciting execution of subscription agreements and contributions to capital of GGR.

67. Representatives of defendants personally came to California to solicit purchases of limited partnership interests in GGR.

68. Defendants registered the prospectus and partnership agreement for GGR with the Commissioner of Corporations of the State of California; the prospectus registered with the Commissioner of Corporations expressly states that defendants Jack and Celeste Grynberg are owners of the aforesaid oil and gas leases.

69. More residents of California purchased limited partnership interests in GGR than residents of any other state; more residents of California are members of the plaintiff class than residents of any other state.

70. Defendants sold more partnership interests in the State of California than in any other state; seventeen of the original fifty-two purchasers of limited partnership

interests are residents of the State of California; the next largest number of original purchasers by state of residence is six from the State of Texas and six from the State of Pennsylvania; the next largest number of original purchasers by state of residence is four from the State of Colorado. One of the representative plaintiffs, Paul Danzig, is a resident of the County of Alameda, State of California.

71. All of the California residents who are members of the plaintiff class were solicited to purchase their respective partnership interests within the State of California; and each such California resident executed his or her subscription agreement within the State of California.

72. All limited partners in GGR are members of the plaintiff class; the membership of the class was at all time clearly ascertainable.

73. The claims of the representative plaintiffs in this action are typical of the claims of all members of the plaintiff class. The representative plaintiffs adequately represented the members of the plaintiff class in this action.

74. The issues of law and fact upon which this action is based are common to all members of the class; there is a well defined community of interest among members of the class in the issues of law and fact adjudicated in this action.

75. After commencement of the within action, certain members of the plaintiff class entered into agreements (Tr. Exs. 391) with defendants Jack Grynberg & Associates and Jack Grynberg for the purpose of drilling

three wells on leases in the Dragon Trail Prospect, which said leases were among the leases in dispute in this action; the wells drilled under those agreements are commonly referred to as Wells number 24-6, 44-6 and 44-29. Said agreements were approved by Orders of this Court. Pursuant to the provisions of those agreements, the members of the plaintiff class who entered into the said agreements did not thereby waive any right or claim to which said persons were entitled in this action.

76. Each participant in the drilling of the subject wells, other than defendants Jack Grynberg and Jack Grynberg & Associates, was required to pay a pro rata share of one-half of the expenses up to a total cost of $170,000.

77. The names of the limited partners who agreed to participate in the drilling of Well 24-6 are set forth on exhibit F, Column 1; the percentage of the limited partners' 50% share of costs up to $170,000 of well 24-6 to which each such participant subscribed is set forth in Exhibit F, Column 2; the amount paid by each limited partner participant in well 24-6 as of December 31, 1979 is set forth on Exhibit F, column 3, which said exhibit is hereby incorporated herein by this reference.

78. The names of the limited partners who agreed to participate in the drilling of Well 44-6 are set forth on Exhibit G, Column 1; the percentage of the limited partners' 50% share of costs of well 44-6 to which each such participant subscribed is set forth in Exhibit G, Column 2; the amount paid by each participant in well 44-6 as of December 31, 1979 is set forth on Exhibit G, column 3,

which said exhibit is hereby incorporated berein by this reference.

79. The names of the limited partners who agreed to participate in the drilling of Well 44-29 are set forth on Exhibit H, Column 1; the percentage of the limited partners' 50% share of costs of well 44-29 to which each such participant subscribed is set forth in Exhibit H, Column 2; the amount paid by each participant in well 44-29 as of December 31, 1979 is set forth on Exhibit H, column 3, which said exhibit is hereby incorporated herein by this reference.

80. The outstanding accounts payable to entities other than defendant Jack Grynberg & Associates for well 24-6 are set forth on Exhibit J, which said exhibit is hereby incorporated herein by this reference.

81. The outstanding accounts payable to entities other than defendant Jack Grynberg & Associates for well 44-6 are set forth on Exhibit K, which said exhibit is hereby incorporated herein by this reference.

82. The outstanding accounts payable to entities other than defendant Jack Grynberg & Associates for well 44-29 are set forth on Exhibit L, which said exhibit is hereby incorporated herein by this reference.

83. The outstanding accounts payable to defendant Jack Grynberg & Associates, including both amounts originally billed by defendant Jack Grynberg & Associates, which are proper charges, and amounts originally billed by other entities which have been paid by defendant Jack Grynberg & Associates for well 24-6, are set

forth on Exhibit M, which said exhibit is hereby incorporated herein by this reference.

84. The outstanding accounts payable to defendant Jack Grynberg & Associates, including both amounts originally billed by defendant Jack Grynberg & Associates, which are proper charges, and amounts originally billed by other entities which have been paid by defendant Jack Grynberg & Associates for well 44-6, are set forth on Exhibit N, which said exhibit is hereby incorporated herein by this reference.

85. The outstanding accounts payable to defendant Jack Grynberg & Associates, including both amounts originally billed by defendant Jack Grynberg & Associates, which are proper charges, and amounts originally billed by other entities which have been paid by defendant Jack Grynberg & Associates for well 44-29, are set forth on Exhibit O, which said exhibit is hereby incorporated herein by this reference.

86. The total cost of drilling well 24-6, based on the invoices approved for payment by defendant Jack Grynberg & Associates, with the exception of a charge of $2,304 for Jack Grynberg's time, which is not properly chargeable, was $217,917.44.

87. The total amount to be paid by each member of the plaintiff class who agreed to participate in well 24-6 as his pro rata share of $170,000 is set forth in Exhibit I, Column 2, which said exhibit is hereby incorporated herein by this reference.

88. The total costs of drilling well 44-6, based on the invoices approved for payment by defendant Jack Grynberg & Associates, with the exception of a charge of $2,304 for Jack Grynberg's time, which is not properly chargeable, is $132,146.16.

89. The amount payable by each member of the plaintiff class who agreed to participate in well 44-6 as his pro rata share of $132,146.16 is set forth in Exhibit I, Column 3, which said exhibit is hereby incorporated herein by this reference.

90. The total cost of drilling well 44-29 based on invoices approved for payment by defendant Jack Grynberg & Associates, less $2,304 for Jack Grynberg's time which is not properly chargeable, is $113,752.39.

91. The total contribution required of defendants Jack Grynberg and Jack Grynberg & Associates to the escrow for drilling well 24-6 was 54.006% of costs up to $170,000, and all costs over $170,000, which said sum is set forth on Exhibit I, column 2, which said exhibit is hereby incorporated herein by this reference.

92. The contribution required of defendants Jack Grynberg and Jack Grynberg & Associates to the escrow account for drilling well 44-6 is 52.851% of total costs, which said sum is set forth on Exhibit I, column 3, which said exhibit is hereby incorporated herein by this reference.

93. The contribution required of defendants Jack Grynberg and Jack Grynberg & Associates to the escrow for drilling well 44-29 is 52.5% of total costs.

94. Defendants Jack Grynberg & Associates and Jack Grynberg have contributed $65,000 to the escrow for drilling well 24-6; defendants Jack Grynberg & Associates and Jack Grynberg have contributed $30,000 to the escrow for drilling well 44-6; defendants Jack Grynberg & Associates and Jack Grynberg have contributed $68,251 to the escrow for drilling well 44-29.

95. The escrow agents are entitled to collect the sums due from the participants in wells 24-6 and 44-6 as set forth in Exhibit I, columns 2 and 3, less amounts previously paid, and pay from the escrow accounts for those wells the accounts payable set forth in Exhibits I,J,K and M, which said exhibits are hereby incorporated herein by this reference.

96. The escrow agents are entitled to pay the accounts payable for well 44-29 set forth on Exhibits L and O and refund any funds remaining in the escrow account to the participants, in proportion to their participation in the escrow, as set forth in Findings 79 and 93.

97. If any Finding of Fact set forth herein is determined to be a Conclusion of Law rather than a Finding of Fact, then it shall be deemed to be a Conclusion of Law.

Conclusions of Law

1. The within action is a proper class action on behalf of the plaintiffs; the plaintiff class constitutes a proper and appropriate class.

2. This Court has jurisdiction over each of the defendants herein and over the subject matter of the within action.

3. The GGR prospectus was part of the GGR partnership agreement.

4. The final GGR prospectus and partnership agreement are ambiguous with regard to the contribution to be made by the defendants to the partnership.

5. Defendants made common, material, and fraudulent misrepresentations and nondisclosures to all members of the plaintiff class with the intention of inducing them to subscribe to limited partnership interests in GGR and to make contributions of capital to GGR. Each member of the plaintiff class justifiably relies on such misrepresentations and nondisclosures in purchasing their respective interests in GGR and making their respective contributions to capital of GGR.

6. The members of the plaintiff class were induced to enter into their respective purchases of limited partnership interests in GGR and to make their respective contributions to capital of GGR as a direct and proximate result of common fraudulent misrepresentations and nondisclosures of the defendants.

7. The members of the plaintiff class were entitled to rescind their respective agreements to purchase limited partnership interests in GGR.

8. As a direct and proximate result of each of the fraudulent misrepresentations of defendants, and each of them, the members of the plaintiff class were damaged in the amounts paid by each said member, respectively, as capital payments to or for the subject partnership in the total sum of $4,109,198.39; the damage so suffered by each member of the class is set forth on Exhibit E, column

1, which said exhibit is hereby incorporated herein by this reference.

9. As a further direct and proximate result of each of the fraudulent misrepresentations and nondisclosures of defendants, and each of them, the members of the plaintiff class suffered additional compensatory damages in the sum of $2,202,714.47; damages so suffered by each member of the plaintiff class is set forth on Exhibit E, column 2, which said exhibit is incorporated herein by this reference.

10. The members of the plaintiff class are each entitled to payment from the defendants of the sums paid by each member of the plaintiff class as their respective contributions to the capital of GGR as set forth on Exhibit D, column 1, which said exhibit is hereby incorporated herein by this reference.

11. Defendants are entitled to restoration from the members of the plaintiff class, as an offset against the sums payable by defendants to said plaintiffs as set forth in Conclusion No. 10, of the sums distributed to said plaintiffs from GGR, as set forth on Exhibit D, column 2, which said exhibit is hereby incorporated herein by this reference.

12. The members of the plaintiff class are each entitled to judgment against defendants for the sums set forth in Exhibit E, column 1, which said exhibit is hereby incorporated herein by this reference.

13. Each member of the plaintiff class is entitled to judgment for additional damages against defendants in

the sums set forth on Exhibit E, column 2, which said exhibit is hereby incorporated herein by this reference.

14. The acts and conduct of defendant Jack Grynberg in inducing the members of the plaintiff class to purchase limited partnership interests in GGR were fraudulent, intentional and malicious.

15. Each member of the plaintiff class is entitled to recover punitive or exemplary damages from defendant Jack Grynberg in the sum set forth on Exhibit E, column 3, which said exhibit is hereby incorporated herein by this reference.

16. The members of the plaintiff class are not indebted to defendants, or any of them, for any sums arising out of the GGR partnership.

17. Defendants are entitled to all assets and property of GGR.

18. The members of the plaintiff class did not affirm the partnership contract after acquiring knowledge of the facts constituting the basis for rescission of said agreement.

19. The members of the plaintiff class, individually and collectively, were not guilty or laches in their assertion of their claim for fraud nor in their assertion of their claim to rescind the partnership agreement.

20. The members of the plaintiff class, individually and collectively, are not estopped from asserting their claim to rescission and damages in the within action.

21. The members of the plaintiff class, individually and collectively, did not waive their rights to claim rescission and damages in the within action.

22. The members of the plaintiff class, individually and collectively, did not have unclean hands with regard to the transactions involved in the within action.

23. The members of the plaintiff class, individually and collectively, were not negligent in their conduct in entering into their respective subscription agreements, or in relying upon the representations and nondisclosures of the defendants with regard thereto.

24. California has a strong governmental interest in applying its law to the facts of the instant case.

25. No governmental interest of the State of Colorado will be impaired by applying California rather than Colorado law to the issues or remedies herein; there is a lesser impairment of the governmental policy of the State of Colorado if the law of California is applied to the issues or remedies of the within action than the impairment to California governmental policy if the law of Colorado were applied.

26. No other state has a strong governmental interest which would be impaired by the application of California law to the issues of the within action.

27. California law is the proper law to be applied to the issues of the within action.

28. Those limited partners who participated in the agreements for the drilling of wells 24-6, 44-6 and 44-29, as set forth on Exhibit I hereto, are obligated to pay to the escrow holders for said wells the total sums set forth on

Exhibit I, columns 2 and 3 to the extent not already paid, which said exhibit is hereby incorporated herein by this reference.

29. Defendants Jack Grynberg and Jack Grynberg and Associates are obligated to pay to the said escrow holders the sums set forth on Exhibit I, columns 2 and 3, to the extent not already paid, which said exhibit is hereby incorporated herein by this reference.

30. The escrow holders shall pay all obligations listed on Exhibits J, K, L, M, N and O upon receipt of the funds from all escrow participants as aforesaid, which said exhibits are hereby incorporated herein by this reference. Defendants Jack Grynberg and Jack Grynberg & Associates are solely liable for any and all other debts or expenses chargeable to or arising from the drilling of wells 24-6, 44-6 and 44-29.

31. Defendants Jack Grynberg and Jack Grynberg & Associates are solely liable for any costs of drilling any of wells 24-6, 44-6 and 44-29 in excess of those set forth in Findings 86, 88 and 90.

32. If any Conclusion of Law set forth herein is determined to be a Finding of Fact rather than a Conclusion of Law, then it shall be deemed to be a Finding of Fact.

Dated: December 18, 1980

/s/ SPURGEON AVAKIAN
JUDGE OF THE SUPERIOR COURT